No. 11977

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARNETT POLLACK,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy of the Estates of JUDD BRADLEY and OLLIE V. BRADLEY, Bankrupts,

Appellee.

BRIEF FOR APPELLEE.

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Jurisdictional Statement.

These bankruptcies were commenced on October 9, 1947, in the District Court of the United States for the Southern District of California, Central Division, by the filing by Judd Bradley and Ollie V. Bradley, husband and wife, of petitions under Section 322 of Chapter XI of the Bankruptcy Act (11 U. S. C. Section 722) for arrangements between themselves and their creditors [Tr. pp. 2 and 6]. Thereafter, the District Court approved the petitions and referred the matters generally to one of the referees in bankruptcy of that court [Tr. pp. 5 and 9]. On October 30, 1947, a receiver was appointed for both estates. The debtors' proposed plans of arrangement were never confirmed and orders of adjudication in bankruptcy were entered on December 18, 1947.

This appeal is from an order of the District Court affirming an order of the referee dated February 9, 1948.

Exclusive jurisdiction of proceedings in bankruptcy is vested in the District Courts of the United States (Bankruptcy Act, Section 2, 11 U. S. C. Section 11) and the Courts of Appeals of the United States are vested with appellate jurisdiction thereof (Bankruptcy Act, Section 24, 11 U. S. C. Section 47).

Statement of the Case.

Among the assets of these bankrupt estates was certain real property subject to valid purchase money trust deeds which conveyed the realty together with the rents, issues and profits thereof to the appellant as security for the payment of certain notes. Orange trees grew upon this real property, but none of the trust deeds were entitled or recorded as crop mortgages [Tr. p. 38]. A delinquency occurred under the terms of said notes and trust deeds and the appellant gave notice of default and scheduled a sale of the real property for October 31, 1947.

Prior to the date set for the sale, the debtors filed their petitions under Chapter XI of the Bankruptcy Act seeking an arrangement with their creditors. Upon order to show cause proceedings commenced by the debtor, Judd Bradley, and upon the taking of evidence and the appointment of an appraiser and a receiver and upon their representations, and after determining that there was a marketable equity in the said real property over and above the amount owing to the appellant, the referee made an

order restraining foreclosure of the trust deeds to permit the debtors to effect their plan of arrangement with their creditors. No review was taken from this order and it is final.

At the time originally scheduled for the foreclosure sale there was a crop of oranges on the trees. This crop was picked and sold by the receiver commencing about November 15, 1947. When it later appeared that the debtors could not carry through their plan of arrangement, they were adjudicated to be bankrupts and a further order was made permitting the foreclosure [Tr. p. 22]. The sale was made on January 7, 1948. At this time the oranges had been removed from the trees and the sale resulted in a deficiency in excess of the amount for which the receiver had sold the crop.

Upon order to show cause proceedings commenced by the receiver, the referee determined that the appellant had no interest in the orange crop which was harvested and sold prior to the foreclosure sale. He made extensive findings of fact and conclusions of law [Tr. pp. 36 and 50] which the District Court affirmed without opinion [Tr. p. 56].

The Question of Law.

The only question is whether the appellant has any interest in the crop which was harvested prior to foreclosure of his deeds of trust and subsequent to the issuance by the bankruptcy court of an order restraining the foreclosure, of which order no review was sought.

Argument.

The attention of the court is invited to the fact that there is no crop mortgage existing in favor of the appellant to support his claim. In fact, a mortgage upon this crop existing in favor of Raymond M. Anderson and Elnora Anderson was set aside as a preference voidable under Section 60 of the Bankruptcy Act (11 U. S. C. Section 96) and the lien of that crop mortgage was ordered preserved for the benefit of the creditors of the estate [Tr. p. 42]. Nor does the fact that appellant's trust deeds included "rents, issues and profits" entitle him to the crop growing upon the realty as against the trustor or as against the holder of a subsequent crop mortgage.

Bank of America v. Bank of Amador County (1933), 135 Cal. App. 714, 28 P. 2d 86.

It is well established that the security interest passing to the beneficiary of a deed of trust conveying real property together with the rents, issues and profits thereof is in substance no different than that passing to a mortgagee by a real property mortgage.

Kinnison v. Guaranty Liquidating Corporation (1941), 18 Cal. 2d 256, 115 P. 2d 45.

It is also settled that a mortgagor may sell crops as against his mortgagee and that the mortgagee has no right to the crops until foreclosure and sale.

Bank of Woodland v. Heron (1898), 120 Cal. 614, 52 Pac. 1006.

It is submitted that the same rule governs in the case of trust deeds.

Appellant contends that to deprive him of the proceeds of the sale of the crop would be inequitable. To the contrary. There has been no showing that this crop was part of appellant's security. He took no crop mortgage at any time. There has been no showing that he relied upon the existence of a marketable crop in extending credit to the bankrupt. Only foreclosure at the moment the crop was ripe for picking—a pure, unadulterated windfall—would give him this added security.

Although appellant filed an objection to the restraint against foreclosure [Tr. p. 18, *et seq.*] and a motion to vacate the restraining order [Tr. p. 21, *et seq.*] it is noticeable and conspicuous that nowhere in either the affidavit and objections to restraint against foreclosure, nor the motion to vacate this restraining order, did this appellant demand that the crops growing on the real property involved therein, nor the proceeds of the sale thereof be impounded, sequestered or held for appellant's benefit as additional security.

Attention is also invited to the fact that appellant's deeds of trust were of the purchase money variety [Tr. p. 37]. It is a fair inference that this crop of oranges was produced as a result of credit extended by the Andersons and other unsecured creditors rather than by appellant.

At the foot of page 5 of his opening brief, appellant states that "The title to crops growing on land subject to a Deed of Trust relates back to the date of the giving of the Deed of Trust." This statement is not supported by

either of the two cases cited, neither of which involved title to crops. It is directly opposed to the proposition previously discussed that the trustor may sell these crops prior to foreclosure and may give a crop mortgage upon them.

At page 6, appellant argues that the "Indirect Method of Bankruptcy" should not be invoked to achieve results "Not Within the Direct Power of the Debtor." This argument ignores the many powers conferred upon a trustee in bankruptcy which are not possessed by the debtor or the bankrupt himself. For instance, see Sections 60, 67, 70c and 70e of the Bankruptcy Act (11 U. S. C. Sections 96, 107, 110c and 110e).

Appellant's real complaint seems to be that there was an abuse of discretion by the referee in issuing the original restraining order. At page 7 he says, "The end purpose of such an order could allow successive crops to be harvested and sold until such time as sufficient funds have been realized to pay off all the unsecured creditors in full, thereby, in effect, making a secured creditor pay unsecured creditors." This is a chimerical fear. Such action clearly would be an abuse of discretion which would not be tolerated by our appellate courts. No such abuse is here alleged. Upon the question whether the restraining order should issue, the appellant had his day in court. If there were any abuse of discretion or other judicial error at that time, it is submitted that appellant has waived it by his failure to seek a review of that order.

Conclusion.

Prior to foreclosure, the appellant had no right to the crop in question. At best, he had only a potential right which was postponed and never accrued. He had no right to sell on October 31, 1947, because restrained by the court, and he had no right to the crop as of the date of actual foreclosure because on that date the crop was no longer part of the security. For over fifty years, the Bankruptcy Act has been part of the organic law of the land and the possible effects thereof must be borne in mind by all those engaging in commercial transactions.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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